

Before the  
Federal Communications Commission  
Washington, DC 20544

In The Matter Of

Application of New York Telephone )  
Company d/b/a Bell Atlantic-New York, )  
Bell Atlantic Communications, Inc., )  
NYNEX Long Distance Company, and )  
Bell Atlantic Global Networks, Inc. for )  
Authorization to Provide In-Region )  
InterLATA Services in New York )

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Docket No. 99-205  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**REPLY OF**  
**NETWORK ACCESS SOLUTIONS**

The Bell Atlantic-New York ("BA-NY") application cannot be granted. Section 271 of the Act authorizes the FCC to approve an application by a BOC for authority to provide interexchange service only if the BOC shows, among other things, that it provisions loops and collocation on reasonable terms. The comments of the DOJ and the NYPSC make clear that BA-NY fails to provision DSL-capable loops ("advanced service loops") and collocation on reasonable terms.

**I. The DOJ and NYPSC Agree with CLECs that BA-NY's Record of On-Time Advanced Service Loop Provisioning Is Unsatisfactory**

The DOJ agrees with all CLECs that commented on the issue that BA-NY has failed to show that it provisions advanced service loops in a timely manner.<sup>1</sup> In addition, although the NYPSC has concluded that BA-NY provisions *other* loop types in a timely manner, that agency

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1. DOJ Eval. at 26-28.

admits that it has not yet adopted the data collection requirements necessary to determine whether BA-NY provisions *advanced service loops* in a timely manner.<sup>2</sup> The NYPSC also admits that BA-NY's performance in on-time provisioning of advanced service loops is inadequate when that performance is measured by the single critical measure that presently applies to the provisioning of "complex loops", such as advanced service loops.<sup>3</sup>

Moreover, the FCC's own precedent prohibits it from giving any weight to the BA-NY claim that it provisions advanced service loops in a timely manner more than 90 percent of the time since BA-NY offered no evidence to document that statistic. The FCC has held that it will ignore a BOC's assertion of on-time provisioning of loops in a specified percentage of cases unless the BOC "explain[s] how it derives and calculates" that percentage figure.<sup>4</sup> The BA-NY application cites the Lacouture/Troy affidavit as the *only* support for its claim that advanced service loops are provisioned on-time in more than 90 percent of all cases.<sup>5</sup> But that affidavit does not even *attempt* to explain how that percentage figure was derived.<sup>6</sup>

Even if BA-NY's naked assertion of better than 90 percent on-time provisioning of advanced service loops were entitled to consideration (which it is not), the strength of that assertion plainly is outweighed by conflicting record evidence. Not only do CLECs report that BA-NY's

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2. NYPSC Eval. at 94-95.

3. *Id.* at 5.

4. *Order Denying Second Louisiana § 271 Application*, 13 FCC Rcd. 20599 at ¶ 198 (1998).

5. BA-NY Applic at 20.

6. Lacouture/Troy Affid. at ¶¶ 79, 82.

actual on-time provisioning of advanced service loops is far worse than 90 percent, CLECs, unlike BA-NY, have presented substantial evidence to document their claim.<sup>7</sup>

The FCC also should reject the apparent effort by the NYPSC to convince the FCC to ignore BA-NY's advanced service loop provisioning record on the ground that advanced service loops constitute only a small percentage of all loops.<sup>8</sup> First, BA-NY's own data shows that advanced service loops constitute a large -- rather than a small -- portion of total loop orders. For example, between May and August 1999 BA-NY reports that it provided 11,000 stand alone loops.<sup>9</sup> Of these 11,000 loops, about 3,500 were advanced services loops.<sup>10</sup> Moreover, even if demand for advanced service loops were only a small fraction of demand for all loops combined, this fact would be irrelevant to the question of whether BA-NY provisions loops in a timely manner since the Communications Act requires the FCC to ensure that ILECs provide advanced service loops on reasonable terms without regard to the number of advanced service loop orders as a percentage of total loop orders.<sup>11</sup>

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7. See, e.g., Covad Comments at 16-18; Northpoint Comments at 18-19; *id.* at Att. B.

8. NYPSC Eval. at 7 (implying that BA-NY's failure to comply with a provisioning benchmark is less troubling when the benchmark measures performance on a task that is performed in "low volume" and thus does not affect "mass market entry"). See also; BA-NY Applic. at 20 n.22 (asserting that advanced service loops are a "tiny fraction of all . . . loops that . . . [BA-NY] provides").

9. Lacouture/Troy Affid. at ¶ 66.

10. *Id.* at ¶¶ 78, 52. A few of the 3,500 advanced service loops may have been provisioned prior to May 1999, but the overwhelming majority were provisioned between May and August since few, if any, CLECs provided advanced services in New York until this year.

11. NAS Comments at 2-3.

In addition, although the NYPSC states that it is "optimistic" that meetings between BA-NY and CLECs that began a few weeks before BA-NY filed its application may result in more timely provisioning of advanced service loops *in the future*,<sup>12</sup> the question of whether BA-NY will provision advanced service loops on a timely basis in the *future* is irrelevant to the question of whether the present application may be granted. The FCC has ruled repeatedly that an application seeking authority to provide interLATA service may be granted *only* if loop provisioning is satisfactory *prior to* the time that the application is filed: "[A BOC] must demonstrate that it is in present compliance . . . instead of prospective [compliance based upon] evidence that is contingent upon future behavior."<sup>13</sup> As shown above, the record on that issue is clear: BA-NY has *not* compiled an acceptable record to date in provisioning advanced service loops.

**II. In Light of the Agreement by the DOJ and NYPSC that Loops Cannot Be Provisioned on Reasonable Terms Without the Use of Hot Cuts, BA-NY's Refusal to Use the Hot Cut Process In Transferring a BA-NY Advanced Service Customer to a CLEC Makes BA-NY's Loop Provisioning Unreasonable as a Matter of Law**

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Even if BA-NY had been provisioning advanced service loops within a reasonable time period, the company's refusal to provision advanced service loops by means of the hot cut process when an advanced service customer of BA-NY switches to the CLEC's advanced service would be fatal to its effort to demonstrate that it provisions advanced service loops on reasonable

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12. NYPSC Eval. at 94.

13. *Order Denying Michigan § 271 Application*, 12 FCC Rcd. 20543 at ¶¶ 197-200 (1997). *See also Order Denying South Carolina § 271 Application*, 13 FCC Rcd. 539 at ¶ 38 (1997).

terms.<sup>14</sup> The FCC has recognized that the hot-cut procedure is essential to the loop provisioning process since it is the only reasonable way to avoid disruption in service when an end user transfers service from an ILEC to a CLEC. The DOJ likewise recognizes the importance of the hot cut process.<sup>15</sup> And the NYPSC's decision to devote substantial resources this past summer to improving BA-NY's performance in providing hot cuts shows that it too recognizes that the hot cut process is a crucial part of the loop provisioning process.<sup>16</sup> BA-NY's flat refusal to use the hot-cut process to switch a customer's advanced service from BA-NY to a CLEC guarantees that disruption of the customer's advanced service will occur in those situations. Service disruption will be even more damaging to CLECs' competitive position if the FCC mandates that BOCs permit line sharing as it has proposed<sup>17</sup> since the customer's advanced service and local exchange service then both would be disrupted. Line sharing would allow CLECs to provide advanced service to a given end user over the same line that the BOC uses to provide that user with exchange telephone service. With the hot cut process, the advanced service that the end user obtains from a BOC could be transferred to a CLEC without disrupting either the end user's exchange service or the customer's advanced service,

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14. NAS Comments at 8.

15. DOJ Eval. at 18.

16. NYPSC Eval. at 83-90. *See also Choice One Commun.* at 7-8 (NYPSC Case 99-C-0899, rel. Oct. 27, 1999)(requiring Frontier Communications to provide advanced service loops *via* the hot-cut process and giving the company 30 days to develop procedures for doing so). A survey by the Competitive Policy Institute has found that the single strongest impediment to the decision by a customer to switch service from an ILEC to a CLEC is the customer's fear that service may be disrupted during the changeover. CPI Comments, Att. A at 11.

17. *First Report and Order and Further Notice of Prop. Rulemaking* at ¶¶ 96-107; FCC 99-48, rel. March 31, 1999.

but without the hot cut procedure the customer's exchange and advanced services *both* would be disrupted.

**III. The NYPSC's Failure to Make Even a Tentative Finding that Major Components of the Price of an Advanced Service Loop Complies with TELRIC Bars the FCC from Finding that BA-NY's Loop Provisioning Is Reasonable**

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BA-NY also has failed to show that the price at which it provides DSL loops is reasonable. While the FCC has held that it will not second-guess the validity of a BOC's UNE prices if the PUC avers that those prices were set in accordance with the FCC's TELRIC rules,<sup>18</sup> the NYPSC states that it has not yet determined, even on a preliminary basis, whether several important components of BA-NY's advanced service loop price comply with TELRIC.<sup>19</sup> Together, the price of the components for which no finding of compliance with TELRIC has been made constitute a significant portion of the total price of an advanced service loop. For example, the NYPSC established a proceeding on September 9, 1999 to consider for the first time whether BA-NY's advanced service loop conditioning charges comply with TELRIC, and the NYPSC states that the administrative law judge appointed to make a recommended decision in that proceeding is not scheduled to issue his recommended decision until December.<sup>20</sup> Likewise, the NYPSC does not expect to receive a recommended decision from the administrative law judge until next month on

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18. *Order Denying Second Louisiana, supra*, at ¶ 60.

19. NYPSC Eval. at 79-80, 93.

20. *Id.* at 79-80.

whether BA-NY's charge complies with TELRIC for the loop make-up data that is essential to place an order for an advanced service loop.<sup>21</sup>

**IV. The NYPSC's Claim that BA-NY Complies with the FCC's Collocation Policies Is Demonstrably False In the Three Respects NAS Discussed In Its Opening Comments**

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Although the DOJ offers no opinion on the question of whether BA-NY provides collocation on terms that are reasonable and nondiscriminatory, BA-NY's collocation provisioning is unreasonable in the three respects that NAS discussed in its opening comments. Moreover, while the NYPSC claims that BA-NY's collocation policy in one of these respects is reasonable, the NYPSC is mistaken as a matter of law. Specifically, the NYPSC claims that BA-NY has complied with the FCC's cageless collocation rules in its recent collocation tariff filing,<sup>22</sup> but that is not so since the BA-NY tariff filing does not state the price that a CLEC must pay for cageless collocation.<sup>23</sup> The cageless collocation option that the FCC mandated is worthless to a CLEC unless the BOC's tariff states the price of that collocation option.<sup>24</sup>

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21. *Id.* at 93.

22. NYPSC Eval. at 159-60.

23. NAS Comments at 10-11.

24. Moreover, while the NYPSC has established a proceeding to determine a TELRIC-based price for cageless collocation, a hearing on this matter is scheduled for January 18-19, 2000, and the agency presumably will not set the price of cageless collocation until sometime after the hearing. *See Ruling Modifying Schedule for Module 2* (NYPSC Case 98-C-1357, issued Nov. 3, 1999).

**CONCLUSION**

The comments of the DOJ and the NYPSC support denial of the BA-NY application.

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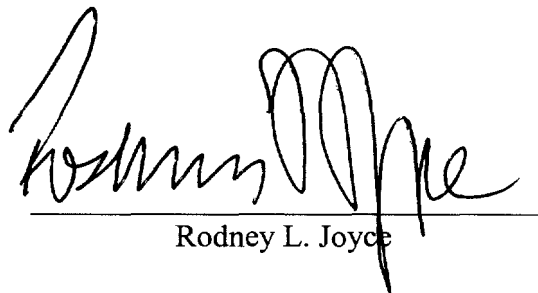
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